IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 309 of 1996
IN
SPECIAL CIVIL APPLICATION No. 769 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE A. L. DAVE

HONOURABLE MR.JUSTICE S. D. DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JEHANGIR TEXTILE MILLS.
Versus
HP DAVE.

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Appearance :
Mr. BR GUPTA for the Appellant.
Mrs. KRISHNA G RAWAL for the Respondent.

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CORAM : HONOURABLE MR.JUSTICE A. L. DAVE

and

HONOURABLE MR.JUSTICE S. D. DAVE

Date : 13/12/2007

ORAL JUDGMENT:- (Per : A. L. DAVE, J.)

1. This is an appeal preferred by the original petitioner to challenge the judgment rendered by learned Single Judge of this Court on 12th February, 1996 in Special Civil Application No.769 of 1995. The said petition was preferred to challenge the orders passed by Labour Court, Ahmedabad and Industrial Court, Ahmedabad, directing payment of back wages for a period of two years to the respondent beyond his age of superannuation of 60 years.

2. The dispute was on question of interpretation of clauses 2 and 3 of the agreement entered into between Ahmedabad Mill Owners' Association, Ahmedabad, and the Textile Labour Association, Ahmedabad. The said clauses run as under :-

> *"2. That every employee of the Technical and Supervisory staff shall be made to retire by the management from the service on his completing the age of 60 year. He shall be*

served with a notice of retirement three months prior to his completing the age of 60 years. However, the employee concerned may be given an extension of service upto his completing the age of 62 years provided :

(i) That the employee of the Technical and Supervisory staff concerned is putting regular attendance in work. The criteria for regular attendance in work shall be his being present for 240 days in last 12 months.

(ii) And if he is otherwise found medically fit.

3. Extension of service shall be for one year at a time and that extension of service for the second year shall also be only on his satisfying the preceding conditions."

3. The question was whether every employee, who was found to be regular in attendance and medically fit has to be continued till he completes the age of 62 years or whether the employer will have any discretion in this regard. According to the appellants, the language of clause 2 has to be read as it is and the word which is used is *"may",* so far as extension of service is concerned, which lends discretion to the employer and, therefore, word *"may"* cannot be or could not have been interpreted as *"shall"*

making it incumbent and compulsory for the employer to continue every employee, who fell within the said criteria of regular attendance and medical fitness. It is also the case of the appellant that this is an agreement between parties and, therefore, intention of parties has to be seen. If the intention of parties was to grant this benefit to all the employees, it would have been drafted in a different manner raising the age of superannuation to 62 years and making an exception in case of employees, who were not found to be regular in attendance and/or were found to be not fit medically. It was, therefore, urged that the Courts below as well as the learned Single Judge have committed an error in interpreting this clause.

4. On the other hand, the case of the respondent is that the interpretation made by the Courts below and the learned Single Judge of this Court is perfectly legal and no interference is called for.

4.1 The second and most important contention seriously raised by the respondent is that this appeal is not maintainable under Clause 15 of the Letters Patent. It was contended that the petition was preferred by invoking jurisdiction under Article 227 of

the Constitution, as is reflected from the cause title as well as body of the petition. The orders of the Courts below were attacked and no relief grantable in exercise of jurisdiction under Article 226 of the Constitution was sought and, therefore, the appeal may be dismissed. It was also contended that this contention was raised at the time of admission of the appeal and the appeal is admitted leaving the question of maintainability of the Letters Patent Appeal open.

5. In rejoinder, it was contended by learned Advocate for the appellant that, though the petition is nomenclatured as a petition under Article 227 of the Constitution, the learned Judge has treated the petition and exercised the powers under Article 226 of the Constitution and, therefore, Letters Patent Appeal would be maintainable.

6. We have taken into consideration rival side contentions. We notice from the cause title of the petition that the petition was preferred invoking jurisdiction under Article 227 of the Constitution. The prayer clause runs as under :-

"(A) To allow this petition and to issue appropriate writ, order and direction to quash and set aside the impugned orders dated 23.12.1993 and 14.12.1994 rendered in T-Application No.216/90 and Appeal (IC) No.8/94 by the Labour Court at Ahmedabad and the Industrial Court at Ahmedabad, copies of which have been annexed at Annexures 'A' and 'C' to this petition respectively; by holding and declaring the same as arbitrary, discriminatory, illegal and unconstitutional.

(B) Pending admission, final hearing and disposal of this petition, the Hon'ble Court be pleased to forthwith stay the operation and implementation of the impugned orders of the Labour Court at Ahmedabad and Industrial Court at Ahmedabad, copies of which are produced at Annexures 'A' and 'C' to this petition.

(C) To grant any other and further relief as may be deemed just and proper in the premises.

(D) To provide for the costs of the petition."

It is clear from the prayer clause that, in substance, what was sought was quashing and setting aside of the impugned orders of the Courts below by holding and declaring them as arbitrary, discriminatory, illegal and unconstitutional. We notice that, in the

body of the petition, there is no averment alleging abrogation of any constitutional right or legal right. We further notice that the petition is preferred against the sole respondent, an ex-employee of the appellant-company and the Tribunal and the Labour Court, whose orders were sought to be assailed in the petition were not joined as party respondents.

7. In light of above factual scenario, we are of the view that the petition was one under Article 227 of the Constitution and the petitioner-appellant invoked that jurisdiction of the High Court by preferring the petition.

7.1 It was seriously contended by learned Advocate for the appellant that the learned Single Judge has treated the petition as one under Articles 226 and 227 of the Constitution and has exercised those powers while rendering the impugned judgment.

7.2 A close scrutiny of the judgment indicates that the learned Single Judge has observed thus :-

"....In this petition before this Court, limited aspect is, to

> *examine the correctness, validity and propriety of the order passed by the Labour Court and Industrial Court which are impugned by the petitioner company in this petition under Articles 226 and 227 of the Constitution of India."*

This observation, in our view, is erroneous and not supported by the material on record. Nowhere Article 226 of the Constitution finds place in the petition nor the contents of the petition indicate that the petitioner invoked extraordinary jurisdiction of the High Court under Article 226 of the Constitution and, therefore, it cannot be said that petition was treated by the learned Single Judge as a petition both under Articles 226 and 227 of the Constitution. This appears to be an error on the part of the learned Single Judge when he observes that the petition is under Articles 226 and 227 of the Constitution.

7.3 It was contended that correctness, validity, propriety and legality of the orders impugned in the petition could have been examined only under Article 226 of the Constitution and, therefore, the petition also needs to be treated as one under Article 226 of the Constitution. It is not possible to accept this contention either. The contents of the petition make it clear that the orders of the

Courts below were challenged under Article 227 of the Constitution, as can be seen from the prayer clause itself. It cannot be accepted that legality, propriety or correctness of an order can be examined only under Article 226 of the Constitution and, therefore, the petition may also be accepted as one under Article 226 of the Constitution.

7.4 It is also to be noticed that the Labour Court and the Tribunal below are not made as party respondents in the petition. The legal proposition as emerging from the decision in the case of *Steel Authority of India v. Gujarat Mazdoor Panchayat, 2004(1) GLR 729* is that the conduct on part of the writ petition in not impleading the Industrial Tribunal as one of the respondents in the petition and in not claiming any specific relief against the Tribunal would indicate that the writ petitioner has chosen to approach the High Court under Article 227 of the Constitution. Therefore, the petition has to be treated as one under Article 227 of the Constitution.

8. The sum and substance of the foregoing discussion is that, although the learned Judge has referred to the petition as one

under Articles 226 and 227 of the Constitution, it is a factual error. The petition, in fact, was preferred under Article 227 of the Constitution and the intention of the petitioner-appellant, as can be read from the contents of the petition, was also to invoke the jurisdiction under Article 227 of the Constitution and, therefore, the appeal would not be maintainable under Clause 15 of the Letters Patent. The petition mainly challenges the order of the Industrial Court as well as the Labour Court, but does not speak of violation of any fundamental or constitutional or legal right and, therefore, the petition has to be treated as one under Article 227 of the Constitution. The appeal, therefore, must fail and stands dismissed.

[A. L. DAVE, J.]

[S. D. DAVE, J.]

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